

FEDERAL COURT OF AUSTRALIA

BGM16 v Minister for Immigration and Border Protection [2017] FCAFC 72

Appeal from:	<i>BGM16 v Minister for Immigration and Anor</i> [2016] FCCA 2297
File number:	NSD 1663 of 2016
Judges:	SIOPIS, MORTIMER AND WIGNEY JJ
Date of judgment:	5 May 2017
Catchwords:	MIGRATION – appeal from decision of Federal Circuit Court of Australia – statutory construction of s 91WA of the <i>Migration Act 1958</i> (Cth) – whether s 91WA limited to the provision of bogus documents as part of, or in connection with, protection visa application – whether s 91WA extends to previous provision of bogus documents in circumstances unrelated to protection visa application – where appellant provided false identity documents for previous visa applications but provided true identity documents for protection visa application – appeal allowed
Legislation:	<i>Migration Act 1958</i> (Cth), ss 4, 5, 65, 91V, 91WA, 91W, 103, 107, 107A, 109, 113, 116, 133C, 195A, 197C, 198, 487ZI, 487ZJ, 487ZK, 501, 501A, 501B <i>Acts Interpretation Act 1901</i> (Cth), s 15AB <i>Convention Relating to the Status of Refugees</i> , opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) <i>Protocol Relating to the Status of Refugees</i> , opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967)
Cases cited:	<i>Attorney-General for the State of South Australia (SA) v Adelaide City Corporation</i> [2013] HCA 3; 249 CLR 1 <i>Baini v The Queen</i> [2012] HCA 59; 246 CLR 469 <i>Berenguel v Minister for Immigration and Citizenship</i> [2010] HCA 8; 84 ALJR 251 <i>Certain Lloyd's Underwriters v Cross</i> [2012] HCA 56; 248 CLR 378 <i>Corporation of the City of Enfield v Development Assessment Commission</i> [2000] HCA 5; 199 CLR 135 <i>Harrison v Melhem</i> [2008] NSWCA 67; 72 NSWLR 380 <i>Independent Commission Against Corruption v Cunneen</i>

[2015] HCA 14; 256 CLR 1
Lacey v Attorney-General for the State of Queensland
[2011] HCA 10; 242 CLR 573
Project Blue Sky Inc v Australian Broadcasting Authority
[1998] HCA 28; 194 CLR 355
Saeed v Minister for Immigration and Citizenship (2010)
241 CLR 252
Taylor v Owens [2014] HCA 9; 253 CLR 531
Timbarra Protection Coalition Inc v Ross Mining NL
[1999] NSWCA 8; 46 NSWLR 55

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Category:	Catchwords
Number of paragraphs:	107
Counsel for the Appellant:	Dr SC Churches
Solicitor for the Appellant:	AXL Legal Solutions
Counsel for the First Respondent:	Mr S Lloyd SC with Ms S Palaniappan
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	The Second Respondent submits to any order the Court may make in the proceeding, save as to costs.

ORDERS

NSD 1663 of 2016

BETWEEN: **BGM16**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: **SIOPIS, MORTIMER AND WIGNEY JJ**

DATE OF ORDER: **5 MAY 2017**

THE COURT ORDERS THAT:

1. 1. The appeal be allowed.
2. 2. The orders of the Federal Circuit Court made on 2 September 2016 be set aside.
3. 3. In lieu thereof, order that the decision of the Administrative Appeals Tribunal dated 20 April 2016 be set aside, and the matter be remitted to the Tribunal, differently constituted, for determination according to law.
4. 4. The first respondent pay the appellant's costs of the appeal and of the application to the Federal Circuit Court.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

SIOPIS J:

1 I have had the benefit of reading in draft the reasons for judgment of Mortimer and Wigney JJ. The detailed exposition and analysis by their Honours relieves me of the need to set out the background to this appeal.

2 I agree that the appeal should be allowed and that the orders proposed by Mortimer and Wigney JJ be made, but wish to make the following observations.

3 In my view, the construction issue upon which the outcome of this appeal depends, can be resolved by having regard to the text of s 91WA(1)(a) of the *Migration Act 1958* (Cth) when read in context.

4 It is apparent from the terms of s 91W and s 91WA that there are two premises which underlie s 91WA of the *Migration Act*. These are that the ascertainment of the identity, nationality or citizenship of an applicant for a protection visa is of fundamental importance to the grant of a protection visa; and related, thereto, that the Minister is to have regard to those issues in the course of considering the applicant's protection visa application.

5 Consistent with those premises, s 91WA(1) mandates that the Minister is to refuse to grant an application for a protection visa in two circumstances.

6 The first of the nominated circumstances, is "if the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship" (s 91WA(1)(a)). The other circumstance is, if the Minister is satisfied that "the applicant has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or has caused such documentary evidence to be destroyed or disposed of" (s 91WA(1)(b)).

7 Each of these two circumstances describes conduct by an applicant for a protection visa which is inimical to the effective implementation of the premises which underlie s 91WA. This is because such conduct by a protection visa applicant would prevent or hinder the Minister from determining, in the course of considering the protection visa application, the true identity, nationality and citizenship of the applicant; and so would undermine the integrity of the protection visa application process and any resulting decision in respect of that application.

8 In my view, therefore, on its ordinary meaning, when read in context, the text of s 91WA(1)(a) is directed specifically to conduct by an applicant for a protection visa in relation to the making of an application for a protection visa.

9 I do not accept, as the Minister contended, that the text of s 91WA(1)(a) is to be construed as referring to any such conduct by a protection visa applicant, notwithstanding, that it was not engaged in by the applicant in relation to the making of the protection visa application. Such a wide construction is incongruous with the premises which underlie s 91WA.

10 Section 15AB of the *Acts Interpretation Act 1901* (Cth) relevantly provides as follows:

- (1) Subject to sub-section (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —
 - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act;...
- (3) In determining whether consideration should be given to any material in accordance with sub-section (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to —
 - (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
 - (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

11 Whilst, in some circumstances, there may be a need to exercise caution in the weight to be attributed to extrinsic materials for the purpose of determining the proper construction of a statutory provision, in my view, the extrinsic materials in this case do provide the assistance contemplated by s 15AB(1)(a) of the *Acts Interpretation Act*. This is because the Explanatory Memorandum demonstrates an intention that s 91WA(1)(a) of the *Migration Act* is to be construed as having the ordinary meaning to which I have referred at [8] above. The relevant extracts from the Explanatory Memorandum are referred to in the reasons for judgment of Mortimer and Wigney JJ.

12 12 Accordingly, as I have said, I agree that the appeal should be allowed.

I certify that the preceding twelve
(12) numbered paragraphs are a
true copy of the Reasons for
Judgment herein of the Honourable
Justice Siopis.

Associate:

Dated: 5 May 2017

REASONS FOR JUDGMENT

MORTIMER AND WIGNEY JJ:

13 13 This appeal concerns a single question of statutory interpretation: namely, the proper construction of s 91WA(1)(a) of the *Migration Act 1958* (Cth) which imposes, subject to s 91WA(2), a duty to refuse to grant a protection visa if an applicant “provides a bogus document as evidence of the applicant’s identity, nationality or citizenship”. The constructional choice to be made is whether this provision applies only if the bogus document is provided as part of, or in connection with the protection visa application (the appellant’s contention) or whether it applies if, at any time (whether in connection with a visa application or any other conduct) a bogus document is provided by a person who then applies for a protection visa (the Minister’s contention). The choice between the two competing contentions is not insignificant, and has real consequences for the administration of the *Migration Act* in relation to protection visa applicants.

14 14 For the reasons set out below, the appellant’s contention is to be preferred, and the appeal should be allowed.

BACKGROUND

15 15 The debate over the application of s 91WA to the appellant’s circumstances has been the central issue in the determination of his protection visa application since he applied for review to the Tribunal. In that sense, there has been, for cases of this kind, an unusual focus on the competing arguments through the various tiers of merits and judicial review.

16 16 The factual background is not contentious, nor is the history of the appellant’s conduct concerning the use of false documents.

17 17 The appellant entered Australia on 19 October 2012, on a Greek passport containing an electronic visitor visa. The Greek passport was, the appellant subsequently admitted to the Administrative Appeals Tribunal, a passport he had purchased in Greece in the name of a person the Tribunal identified as “Mr N”. He admitted that the passport had his photo, which had been substituted for the original photo of Mr N. He admitted that when he purchased the passport, it contained an electronic visa for entry into Australia. Included in the purchase price, he admitted to the Tribunal, was also a plane ticket to Sydney in Mr N’s name.

18 18 The appellant admitted to the Tribunal that he had produced the Greek passport with the electronic visa to Australian border security officers upon his entry into Australia. He admitted that while in Australia, he had applied for and been granted two further visitor visas and one student visa over a two year period and on each occasion he had provided the Greek passport to the Minister's delegates as evidence of his identity and nationality. He also admitted providing the Greek passport as evidence of his identity and nationality in a second student visa application, to which we return below.

19 19 Matters came to a head for the appellant on 11 June 2014 when his application for a second student visa relying on the Greek passport was refused. After that date, the appellant had no valid visa. It appears that about the same time, the appellant sought to renew a NSW driver's licence he had in the name of Mr N. On the account given to the Tribunal (and to the delegate), while at the NSW Road Transport Authority (RTA) office to renew his driver's licence the appellant became concerned there were police officers in the building looking for him. He fled, leaving behind his Greek passport in the name of Mr N and his (expiring) driver's licence. RTA staff called police but the appellant was not then apprehended.

20 20 To compound the impression (which might have been gathering momentum) that the appellant had no qualms about the use of false documents, he also admitted to the Tribunal (and the delegate) that he had obtained a second driver's licence in the name of another person, whom the Tribunal described as "Mr B". He admitted he had purchased this driver's licence, with his own photo substituted for the original photo of Mr B, from an Albanian man in Sydney a few weeks after his failed attempt to renew his driver's licence in the name of Mr N.

21 21 On 29 June 2015, he was located by NSW police during a road stop, and his second false driver's licence was discovered. Although initially maintaining he was Mr B, he acknowledged his real identity to NSW police. No criminal charges were pressed and the appellant was detained in immigration detention on 30 July 2015. He made his application for a protection visa on 25 August 2015.

22 22 The appellant, the Tribunal found and the Minister does not dispute, is in fact an Albanian national with a different name and identity to "Mr N". At the Tribunal, he produced his Albanian National Identity Card, issued in 2009 and valid until 2019, a birth certificate and a family book registration, both from Albania and issued in May 2015.

23 23 The appellant used these Albanian documents to provide evidence of his identity and nationality for his protection visa application. It is this fact which gives rise to the construction question. The appellant did not provide any bogus documents as evidence of his identity, nationality or citizenship as part of his protection visa application, or in connection with it. For this reason, he contends s 91WA does not apply to him.

24 24 The appellant's protection visa application was refused by a delegate of the Minister on 19 October 2015. Although the delegate made adverse findings on the credibility of the appellant, he did not consider the application of s 91WA. On review in the Tribunal however, s 91WA had become the central issue, as the Tribunal noted at the start of its reasons (at [5]):

The issue in this case is whether the applicant is prevented from grant of a protection visa by s 91WA of the Act.

25 25 We deal with the Tribunal's decision below, but first it is necessary to set out the relevant aspects of the legislative scheme.

RELEVANT LEGISLATIVE PROVISIONS

26 26 Section 91WA appears in Part 2, Division 3, Subdivision AL of the *Migration Act*, which is entitled "Other provisions about protection visas". Division 3 itself is entitled "Visas for non-citizens" and contains in Subdivisions A to AH the key provisions of the Act concerning the application for, and grant or refusal of, all the kinds and classes of visas available under the Act. From subdivisions AI to AL there are a series of provisions dealing mostly, or entirely with persons who in one way or another seek protection in Australia. Most, but not all, of these subdivisions concern only protection visas.

27 27 Section 91WA provides:

91WA Providing bogus documents or destroying identity documents

- (1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:
 - (a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or
 - (b) the Minister is satisfied that the applicant:
 - (i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or
 - (ii) has caused such documentary evidence to be destroyed or disposed of.
- (2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

- (a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and
- (b) either:
 - (i) provides documentary evidence of his or her identity, nationality or citizenship; or
 - (ii) has taken reasonable steps to provide such evidence.
- (3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented.

28 28 The text of s 91WA may suggest that s 91WA(1)(a) is a jurisdictional fact, especially when read in contrast to the language of satisfaction used in s 91WA(1)(b). See generally *Timbarra Protection Coalition Inc v Ross Mining NL* [1999] NSWCA 8; 46 NSWLR 55 at [36]-[44] (Spigelman CJ) and *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; 199 CLR 135 at [45]-[50] (Gleeson CJ, Gummow, Kirby and Hayne JJ). Senior counsel for the Minister accepted this and submitted that characterisation would be consistent with s 487ZI, which we deal with below.

29 29 The term “bogus document” is a defined term. Section 5 provides:

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

30 30 Section 91WA was inserted into the Act by Part 2 of Schedule 1 of the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth). The provision came into operation on 18 April 2015. Prior to its enactment, the only provision in subdivision AL about bogus documents was s 91W. In its previous form it provided:

91W Documentary evidence of identity, nationality or citizenship

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant’s identity, nationality or citizenship.
- (2) If:
 - (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request; and

- (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request; and
- (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister may draw an inference unfavourable to the applicant's identity, nationality or citizenship in the event that the applicant refuses or fails to comply with the request;

then, in making a decision whether to grant the protection visa to the applicant, the Minister may draw any reasonable inference unfavourable to the applicant's identity, nationality or citizenship.

31 31 After the 2015 amendments, s 91W provided:

91W Evidence of identity and bogus documents

- (1) The Minister or an officer may, either orally or in writing, request an applicant for a protection visa to produce, for inspection by the Minister or the officer, documentary evidence of the applicant's identity, nationality or citizenship.
- (2) The Minister must refuse to grant the protection visa to the applicant if:
 - (a) the applicant has been given a request under subsection (1); and
 - (b) the applicant refuses or fails to comply with the request, or produces a bogus document in response to the request; and
 - (c) the applicant does not have a reasonable explanation for refusing or failing to comply with the request, or for producing the bogus document; and
 - (d) when the request was made, the applicant was given a warning, either orally or in writing, that the Minister cannot grant the protection visa to the applicant if the applicant:
 - (i) refuses or fails to comply with the request; or
 - (ii) produces a bogus document in response to the request.

32 32 It can be seen that both versions of s 91W deal with provision of documents on request of the Minister or an officer.

33 33 Notwithstanding the breadth of the definition of "officer" in s 5, it is apparent that both versions of s 91W applied only to production of documents where a specific request had been made, and the request could, on the terms of the section, only be made to a person who was a protection visa applicant.

34 34 Section 91V is entitled "Verification of information". It deals with two situations – applicants for a protection visa (sub-ss (1)-(3)) and "non-citizens" who are refused immigration clearance (sub-ss (4)-(6)). Each set of provisions authorises a request to be made to a protection visa applicant, or to a non-citizen refused immigration clearance respectively,

for the person to make an oral statement on oath or on affirmation, to the effect that the information provided by the person to an officer, or to the Minister, is true. In relation to protection visa applicants, “reasonable” inferences can be drawn that are unfavourable about a person’s credibility if she or he refuses to comply with the request, or complies with it in a way that gives the Minister reason to believe the person was not “sincere”. The provisions about non-citizens refused immigration clearance are similar (and somewhat wider), but their detail is not relevant to the present appeal.

35 35 There are some provisions in Subdivision C of Division 3 which are relevant to the constructional question. These provisions deal with cancellation of visas where incorrect information or “bogus documents” have been provided. We deal with those provisions in more detail below.

36 36 It is not without significance that s 91WA appears to be the only provision in the Act which requires (or even authorises) the refusal of a visa for the provision of bogus documents (or where an applicant has destroyed or disposed of documentary evidence of their identity, nationality or citizenship), in the absence of a specific request by the Minister or an officer for those documents. The scheme of the Act is otherwise to authorise cancellation of any visa granted in reliance on such documents or information. The Minister’s submission is that the introduction of s 91WA represents a legislative intention to “bring forward” the consequences of the general use of bogus documents. That may be the case: the question is, in what circumstances.

THE TRIBUNAL DECISION

37 37 The appellant applied for review to the Tribunal on 3 November 2015. As we have noted, the Tribunal identified the potential application of s 91WA as the single issue confronting it, before it could embark on any review of the delegate’s substantive decision on the appellant’s protection visa application.

38 38 The Tribunal’s findings about whether the Greek passport was a bogus document within the meaning of the definition in s 5 appear at [39] and [41] of its reasons:

The Tribunal reasonably suspects the applicant has obtained the Greek passport because of a false or misleading statement. The Tribunal considers that suspicion is reasonable because without making a false or misleading statement, the first named applicant could not have possession of Mr N’s Greek passport. Further, the passport appears to have been altered by someone who did not have the authority to do so. The applicant is not Mr N and is not a national or citizen of Greece. The Tribunal further finds the applicant has made a false or misleading statement by presenting the

Greek passport as evidence of his identity upon entering Australia and in relation to visas applied for since entering Australia.

...

I consider the Greek passport to be a bogus document because I reasonably suspect that it purports to have been but was not, issued in respect of the applicant. I further reasonably suspect that the Greek passport was fraudulently altered.

39 39 This appears to be a finding that the Greek passport falls within para (a) of the definition of bogus document in s 5 of the *Migration Act*, and perhaps also para (b).

40 40 Noting that there was no “judicial guidance” on the question, the Tribunal went on to consider carefully the competing construction arguments about s 91WA. At [48]-[49] the Tribunal concluded:

While I considered these alternate constructions, in the absence of judicial guidance, I have proceeded on the basis of what I consider to be the preferable interpretation of the provision based on its literal meaning and broadest scope of section 91WA. In comparing the language used in 91WA to that used in 91V and 91W, I give weight to the absence of any express language in 91WA limiting the provision of a bogus document other than to be for the purpose of establishing identity, nationality or citizenship to conclude that Parliament intended no limitation on the application of its provisions as to who, when or in what context a person subsequently applying for a protection visa provided a bogus document as to their identity, nationality or citizenship.

I add, for the sake of completeness, that I have examined the explanatory memorandum (EM) relating to section 91WA in considering its scope. The construction of s91WA set out in the paragraph above may reflect a general description of s91WA in the EM to be an ‘integrity measure’, but as this is obvious, I consider it provides no assistance in interpreting the provision, I note that in parts, the EM mentions ‘the provision of bogus documents by a protection visa applicant *for the purposes of their application*’ (*emphasis added*), but as this language is not then replicated in the text of the enactment, I place no weight on its inclusion in the EM.

41 41 The Tribunal then went on to consider s 91WA(2) and found it was not satisfied the appellant had provided a reasonable explanation for providing the bogus document for the purposes of s 91WA(2)(a). The Tribunal’s conclusion meant it did not consider the merits of the appellant’s protection claim.

THE FEDERAL CIRCUIT COURT DECISION

42 42 On judicial review, the single question of the application of s 91WA was raised. The Federal Circuit Court accepted the Minister’s arguments that it applied, and found no error in the Tribunal’s decision.

43 The Federal Circuit Court rejected (at [23] and [34]) the relevance of the use of the present tense in the word “provides” and “providing” in s 91WA; found there was no ambiguity in the provision sufficient to justify resort to extrinsic material (at [27]); rejected the appellant’s submissions about the narrow purpose of the provision being to prevent use of bogus documents in protection visa applications (at [30]); did not find the text or context of the provisions in subdivision C of Div 3 of Part 2 of any assistance (at [31]) and found no warrant to read any temporal limitation into s 91WA (at [33]).

RESOLUTION

44 In our opinion, the construction of s 91WA is not attended by the complexities that the parties’ submissions may have suggested. Its ordinary meaning is tolerably clear once the purpose and context of the provision are, as they must be, considered together with its text.

45 The appellant’s conduct was, on his own admission, dishonest. It might be characterised as persistently and flagrantly so. However one does not start with the flagrant dishonesty of his conduct and then construe s 91WA. Section 91WA can and must be construed independently of what the appellant has done.

The Minister’s construction

46 The Minister submits the scope of s 91WA(1) is unconstrained by any temporal or circumstantial limits. He makes that submission about both paras (a) (in issue here) and (b) of s 91WA(1). He submits that the giving, presenting or provision of a bogus document at any time, in any place by a person, if discovered, is sufficient to trigger the operation and application of s 91WA to that person when she or he comes to apply for a protection visa. The rationale for this was described by senior counsel for the Minister in oral submissions as:

Parliament thinks that protection visas shouldn’t be granted to people who don’t show integrity in their dealings.

47 If the Minister’s construction is accepted, a person who has “provided” a bogus document to enter a nightclub 20 years ago in a third country would be within this provision.

48 To take other examples, not in our opinion far-fetched. A person enters Australia lawfully on a student visa, which is then cancelled for non-completion of study requirements. The person applies for a protection visa on a sur place basis because of, let it be assumed, entirely meritorious reasons easily corroborated by country information, but in the meantime the person is on a bridging visa and unable to work. The person uses a false driver’s licence

as an identity document to secure employment to meet basic needs. On the Minister's construction, this conduct would be within the scope of s 91WA(1)(a). To access Australia's protection visa regime, the person would be dependent on the discretionary application of s 91WA(2) and it is not far-fetched to imagine that some decision-makers may not consider using a false driver's licence to secure employment to be a reasonable explanation.

49 49 Second, a Rohingya who flees the regime in Myanmar and who (let it be assumed) has a meritorious claim for protection. During her entry interview she confesses that during military raids while she was in Myanmar she destroyed all her identity documents and fled across the border to Thailand where, after several years and before her entry into Australia, through UNHCR she secured new identity documents disclosing her true identity. Her conduct would nevertheless be within s 91WA(1)(b) on the Minister's construction. The destruction of her original identity documents had nothing to do with her claim for protection in Australia, and was done to avoid detection by the Myanmar military while she lived in Myanmar. She was honest and made full disclosure of her true identity and nationality in her protection visa application. To access Australia's protection visa regime, the person would be dependent on the discretionary application of s 91WA(2) and her credibility would have to withstand an initial assessment, out of context and under the pressure of knowing she may lose her right to apply for asylum, before she could make her claims on the merits.

50 50 The Minister could have adopted a construction which limited the scope and operation of s 91WA to conduct by a person in connection with previous visa applications. However he did not. Had he done so, we would have rejected that approach for the same reasons we give below. The more unrestricted scope for which the Minister does contend should also be rejected.

Applicable principles of statutory construction

51 51 The construction issue in this appeal is not about the meaning of an individual word in a statute, nor even about the meaning of a phrase. It is about the scope and operation of an entire provision. In determining the scope and operation of the entire provision, it will be necessary to express or describe how the provision operates by using language other than that which appears in the statute. Contrary to the approach taken by the parties in this case, that is not an exercise in "reading in" words. It is simply expressing a legal conclusion about the proper construction of the scope and operation of the provision.

52 52 Section 91WA sits in a particular location in the *Migration Act*, itself a complex statutory scheme giving effect to a variety of objectives and policies which are all related to which non-citizens are able to enter or remain in Australia, and the circumstances in which they may do so. With a statute of that nature it is especially important to ensure that constructional choices, where they exist, are made so that a meaning is arrived at that is “consistent with the language and purpose of all the provisions of the statute”, on the basis its provisions are intended to give effect to harmonious goals, and so that effect is given to the purpose and language of the provisions in question while maintaining the unity of all the statutory provisions: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [69]-[70] per McHugh, Gummow, Kirby and Hayne JJ. In relation to the *Migration Act*, that is no easy task.

53 53 The meaning of statutory phrases or provisions of course depends on the context. In *Taylor v Owens* [2014] HCA 9; 253 CLR 531 at [65]-[66], Gageler and Keane JJ (dissenting as to outcome but expressing orthodox principle, in our respectful opinion) said:

Statutory construction involves attribution of legal meaning to statutory text, read in context...

Context more often reveals statutory text to be capable of a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural. The choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies.

54 54 It is as well to recall what was said by the majority in *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1 at [57] (there, of the phrase “adversely affected”) about “rules” of construction (footnotes omitted):

...As was earlier observed, ‘adversely affect’ is a protean expression capable of a number of meanings according to the context in which it appears. The technique of statutory construction is to choose from among the range of possible meanings the meaning which Parliament should be taken to have intended. Contrary to counsel’s submission, there was and is nothing impermissible about looking to the context in which s 8(2) appears or seeking guidance from the objects of the ICAC Act as stated in s 2A. Rather, as Mason J stated in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*, it was and is essential to do so:

‘[T]o read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation; Attorney-General v Prince Ernest Augustus of Hanover*. Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be

considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.’

55 55 Some emphasis was placed by the appellant on the principle of legality and its operation in the construction of s 91WA. French CJ explained the principle in *Attorney-General for the State of South Australia (SA) v Adelaide City Corporation* [2013] HCA 3; 249 CLR 1 at [42] in the following way:

Statutes are construed, where constructional choices are open, so that they do not encroach upon fundamental rights and freedoms at common law. The common law presumption against the parliamentary intention to infringe upon such rights and freedoms has been described as an aspect of a ‘principle of legality’ which governs the relationship between parliament, the executive and the courts. The presumption is of long standing and has been restated over many years. It can be taken to be a presumption of which those who draft legislation, regulations and by-laws are aware. To apply it is to act conformably with legislative intention as explained by this court in *Lacey v Attorney-General (Qld)*.

(Footnotes omitted.)

56 56 There is no occasion to invoke the principle of legality in the construction of s 91WA(1). Neither competing construction encroaches on fundamental rights and freedoms, despite the provision dealing with protection visas. The “unfocused invocation” of the principle of legality is to be guarded against: see *ICAC v Cunneen*, Gageler J (in dissent) at [88].

57 57 Nor is it instructive to ask, as the appellant’s submissions tended to do, whether a “wide” or “narrow” construction should be adopted, or whether a particular construction “extends” or “restricts” the application of a provision. Those questions may deflect attention from the real task of interpretation, which is to discern the meaning of the provision given its text, context and purpose.

Purpose

58 58 The purpose of particular provisions in, or part of, a legislative scheme should be derived from the language chosen and the context as revealed by the structure of the statute, not from matters external to the Act: *Lacey v Attorney-General for the State of Queensland* [2011] HCA 10; 242 CLR 573 at [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [24]-[25] (French CJ and Hayne J).

59 59 The Minister accepts that the text of s 91WA is directed only at applicants for protection visas. That is, the legislative scheme does not subject applicants for other kinds of

visas to the risk of being denied consideration of the merits of their visa applications because of their use of bogus documents, or their conduct in destroying documents relating to identity, nationality or citizenship.

60 60 In our opinion, the purpose of these provisions is to ensure the identity, nationality and citizenship of applicants for protection visas is accurately ascertained, by creating a disincentive for applicants to persist, through the protection visa process, with concealing their true identities. That is the purpose of sub-ss 91V(1) to (3) which deals with verification of applicants for protection visas, and of s 91W, which deals with requests for documentary evidence of identity, nationality or citizenship, and of s 91WA. The disincentive in s 91V is that reasonable adverse inferences can be drawn about the applicant's credibility from non-compliance, or the manner of compliance with, a request for information. The disincentive in s 91W is refusal of a protection visa if there is non-compliance with a request to provide documentary evidence or the production of a bogus document in response to the request. And the disincentive in s 91WA is refusal of a protection visa without consideration of the merits of the claim if "bogus" identity documents are provided, or identity documents are destroyed, without reasonable explanation and provision of a person's accurate identity information.

61 61 The object of the *Migration Act* is stated in s 4(1) to be a singular one:

The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

62 62 Essential to regulating the coming into and presence in Australia of non-citizens is to understand who they are, and where they have come from. The role of false documentation in the movement of people around the world is a notorious fact. It is unsurprising the legislature has seen fit to deal with the provision of false or inaccurate documentation in express terms in many places, and in many ways, in the *Migration Act* as an essential part of securing the objective in s 4(1).

63 63 More particularly, an individual's identity, nationality and citizenship are critical in the assessment of a protection visa application. This information goes to the fundamentals of the decision-making process, such as the country of nationality against which a person's claims are to be assessed. This information will often go to the core of an applicant's claims, because who a person is and where she or he comes from are integral aspects of why she or he claims to have a well-founded fear of persecution, or to fear significant harm for the

purposes of complementary protection. Finally, whether an individual's claims are accepted as credible will often depend on the decision-maker being satisfied of a person's true identity.

64 Ascertainment of true identity and nationality as a purpose is confirmed by several aspects of s 91WA itself. The two limbs of sub-s (1) deal with the two ways in which a person's true identity may be concealed: the giving of "bogus documents", or the destruction of identity documents so a person has none. Both kinds of conduct are apt to frustrate the need to be able to establish who a protection visa applicant really is in order properly to process and assess her or his claims.

65 The terms of s 91WA(2)(b) also confirm this purpose because, to secure the benefit of the exculpatory provision, a person must prove to the satisfaction of the Minister her or his true identity, or at least attempt to prove her or his true identity.

66 Finally, the use of the phrase "as evidence of" in s 91WA(1) ("the applicant provides bogus documents **as evidence of** the applicant's identity") is consistent with the purpose we have outlined above. It ties the provision of such documents to the need for an applicant to prove her or his identity as part of the protection visa assessment process.

67 The Minister's construction would give s 91WA an entirely different purpose. Although there may be no doubt about a person's true identity, nationality or citizenship for the purposes of her or his protection visa application, the Minister's construction would give s 91WA a punitive purpose by imposing a consequence for earlier acts of dishonesty, disconnected with the person's protection visa application. That is a different proposition from the one put by the appellant relying on Art 31 of the Refugees Convention (*Convention Relating to the Status of Refugees*, done at Geneva on 28 July 1951, as amended by the *Protocol Relating to the Status of Refugees*, done at New York on 31 January 1967). Article 31 deals with states' obligations not to impose penalties on those seeking asylum for any illegal entry (Art 31(1)), and states' obligations not to impose undue restrictions on the freedom of movement of those seeking asylum. Neither of those obligations (assuming they could be taken into account in the construction exercise) are relevant. However, the point we seek to make here is that the Minister's construction suggests s 91WA is intended to visit upon a protection visa applicant a legal consequence for earlier acts of dishonesty, including (the Minister's senior counsel conceded) acts of dishonesty about identity (such as providing a false driver's licence to gain employment) that are disconnected in time and circumstance with the processes of the *Migration Act*.

Context

68 68 Section 91WA appears in a sub-division dealing entirely with protection visa applications. It is not replicated anywhere else in relation to other visa applications. Although it might be said to deal with how a protection visa application is to be disposed of, there is nothing in the context which suggests a focus on events or conduct which are not connected to the protection visa application itself, or to the process of determining that application. The fact that parts (and only parts) of s 91V deal with requests for verification of information “relevant to the administration or enforcement” of the *Migration Act* or regulations (see s 91V(4)(b)) and empower the drawing of inferences “in making a decision about the non-citizen under” the *Migration Act* or regulations (s 91V(5) and (6)) illustrates that where Parliament intends provisions of this kind to apply outside the regime for the determination of protection visa applications, it says so.

69 69 We accept the appellant’s submission that there is a basis to read ss 91WA and 91W together, especially given their legislative history. The Minister accepted in argument that the focus of s 91W is on what occurs in the making of a protection visa application. He does not submit that a request can be made of a protection visa applicant outside of, or disconnected from, the process of determining her or his protection visa application. Yet s 91W does not say, in terms, that the request in s 91W(1) can only be made during the process of a protection visa application and for the purpose of that application. It depends, just as s 91WA(1) depends, only on the status of a person as an applicant for a protection visa. For s 91W, a person must have that status before s 91W(1) authorises a request to be made. For s 91WA, a person must have that status before a refusal of a protection visa application can be made. There is no relevant distinction between their context in the way the Minister submits.

70 70 The final contextual matter to note is that s 91WA(1) imposes a duty on the Minister, his delegates and any merits reviewer, to refuse to grant a protection visa, thus rendering inapplicable the usual operation of s 65 of the *Migration Act*. The Minister is correct to submit that s 91WA(1) must not be read divorced from the exculpatory discretion in sub-s (2). However it is also the case that in considering the constructional choice, the mandatory effect of s 91WA(1) must be taken into account. In the absence of a reasonable explanation, the effect of the provision is to deny to the decision-maker any power to consider the merits of the protection visa application, no matter how significant those merits are. The effect is also to deny to an applicant an opportunity to claim protection in Australia, no matter how great the need is. To construe the scope of s 91WA(1)(a) as including any conduct by an applicant

for a protection visa involving the provision of a bogus document to anyone at any time, and the scope of s 91WA(1)(b) as including the destruction or disposal of identity documents at any time, and anywhere, means the Court should, in our opinion, be comfortably satisfied Parliament intended the deprivation of access to Australia's protection regime to operate that widely. It is a drastic result. If that is, on a proper construction, what Parliament intended, then so be it. But where the outcome for individuals is so serious, in our opinion the Court should be confident that is the outcome Parliament intended and the textual, contextual and purposive considerations which are said to result in that conclusion should be clear.

71 71 As well as harshness, the outcome for which the Minister contends has features of absurdity (the night club example) and unfairness (the two examples given at [48] and [49] above), being the kind of features which may lead a Court to prefer a construction without those features. *Berenguel v Minister for Immigration and Citizenship* [2010] HCA 8; 84 ALJR 251 concerned a regulation which required a visa applicant, in order to be found to have competent English, to have provided an International English Language Testing System (IELTS) result from "a test conducted not more than 2 years before the day on which the application was lodged". The appellant could not secure a booking for the necessary test until after he lodged his application, but in an IELTS test completed after he lodged his application, he exceeded the requisite standard. The Minister contended the regulation required a test prior to application, and that a test after application, even a positive one, although closer to the time at which the visa would be granted, was outside the regulation. The Court (French CJ, Gummow and Crennan JJ) unanimously held (at [26]) that the Minister's construction:

leads to such plain unfairness and absurdity that it is not to be preferred. The alternative construction for which the plaintiff contends does not compromise the purpose of the *Migration Regulations*. There is nothing to prevent relevant information being submitted to the Minister after lodgment of the application. Indeed, s 55 of the Act expressly provides for that to be done and requires the Minister to have regard to such information. The Act specifically provides that the Minister may have regard to up-to-date information and, where the purpose of the relevant criterion is to ensure that the standard of English language competency is recently ascertained, a construction which would deprive him of the most recent information seems to be antithetical to that purpose.

72 72 It is no answer to fall back, as the Minister submitted, on the potentially ameliorating discretionary provisions elsewhere in the scheme, such as s 195A. Provisions such as a 195A are not based on any objective characterisation of a person's circumstances as "deserving". Section 195A depends on the Minister's own view of what is in the public interest and while

the power must be exercised rationally and without legal unreasonableness, a person whose circumstances are, objectively, “deserving” may well not be the beneficiary of a favourable exercise of discretion under s 195A. Further, it would be difficult to see how the intention of s 91WA(1) (if its scope is as the Minister contends) could be flouted or ignored by the exercise of a personal discretion under a provision such as s 195A in circumstances where sub-s 91WA(2) had not been applied.

73 73 One specific submission made by the Minister should be noted. He contended (at [49] of his written submissions):

It should also be made clear that, even if the appellant is precluded from obtaining a protection visa due to the operation of s 91WA, this does not relieve Australia of its non-refoulement obligations.

74 74 This submission fails to address the amendments to the *Migration Act* made by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Act No. 135 of 2014). By s 2 of Part 1 of Schedule 5 of that Act, s 197C was inserted into the *Migration Act*. Section 197C purports to render Australia’s non-refoulement obligations “irrelevant” to the performance of the duties of removal in s 198 of the *Migration Act*.

75 75 We fail to see how it can be said, unequivocally, that an applicant who is refused, on a mandatory basis, a protection visa under s 91WA, and who is therefore an unlawful non-citizen exposed to the mandatory duty of removal under s 198, is a person to whom, according to the *Migration Act*, Australia has non-refoulement obligations. Whether Australia has such obligations at international law is a different matter, but that is of no comfort to a person affected by s 91WA(1), given the presence of s 197C and its purported effect. In construing s 91WA within the legislative scheme, regard must be had to the purported effect of s 197C.

76 76 The purpose and context of s 91WA point towards the construction for which the appellant contends. So too does the text, read with these two features.

Text

77 77 A number of building blocks are apparent in the text of s 91WA, and in the text of s 91W, which clearly indicate its scope is intended to cover what occurs during the protection visa application process.

78 78 The first is that, read with the chapeau to sub-s (1), where s 91WA(1)(a) refers to “the applicant provides”, it obviously means “the applicant for a protection visa provides”. That is, just as with s 91W, the person whose conduct is the subject matter of the provision must be an applicant for a protection visa. The provision contemplates the person will have that status when she or he “provides” the bogus document.

79 79 Next, the use of the verb “provides” in s 91WA in the present tense has significance. This verb is used in s 91WA(1), whereas the verb “produces” is used in s 91W, presumably reflecting the fact that “produce” is more appropriate when used in relation to a request. The definitions of each verb in s 91W(4) and s 91WA(3) respectively are relevantly identical.

80 80 The present tense “produces” is used in s 91W(2) and (3), as it is for “provides” in s 91WA(1), (2) and (3). Clearly, however, the text is referring to conduct that does not occur at one particular point in time. It is referring to conduct that occurs, or might occur, over a certain period of time and in conjunction or contemporaneously with another event: namely, the protection visa application and decision-making process. For example, where in s 91WA(2) (the exculpatory provision) the provision posits first a reasonable explanation and then states that an applicant “provides” documentary evidence of her or his true identity, the use of the apparently present tense there must sensibly refer, in fact, to a past event. That is – bogus documents have been provided, they are discovered, an applicant gives an explanation which is satisfactory to the Minister and also “gives” or “presents”, or “provides” evidence of her or his true identity. In reality, this conduct is occurring in the past. However, the text uses the present tense to signify contemporaneity with the process in which the conduct occurs – that is, the protection visa process.

81 81 Contrary to the Minister’s submissions, in our opinion the use of the present tense in this way does impose a temporal limit: the temporal limit is that the provision must occur during or in connection with an application for a protection visa. That is the point of the use of the present tense in the way we have explained.

Consistency with other provisions

82 82 No inconsistency arises from adopting this construction, in terms of the operation of the legislative scheme as a whole. There is, in s 103, a general prohibition on the provision of bogus documents:

A non-citizen must not give, present, produce or provide to an officer, an authorised system, the Minister, the Immigration Assessment Authority, or the Tribunal

performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented, produced or provided.

83 83 Section 103 is one of the provisions contravention of which can trigger the cancellation power in s 109 of the Act, after there has been compliance with the applicable notice provisions in ss 107 and 107A. These provisions have effect subject to the terms of s 113. Section 113 provides:

113 No cancellation if full disclosure

If the holder of a visa who has been immigration cleared complied with sections 101, 102, 103, 104 and 105 in relation to the visa, it cannot be cancelled under this Subdivision because of any matter that was fully disclosed in so complying.

84 84 As the title to this provision indicates, its effect would appear to be that if a person complies with ss 101 to 105 (all of which impose a variety of obligations about giving correct and accurate information to those performing functions under the Act) and in doing so discloses **prior** non-compliance, that prior non-compliance will not be a ground for cancelling the current visa where there has been full compliance.

85 85 What this provision emphasises is that at least in relation to the grant, refusal and cancellation of visas (and subject to what we set out below about other kinds of cancellation powers) the scheme is concerned with ensuring the provision of accurate, truthful information by those applying for visas. It is concerned to impose adverse consequences for not being accurate and truthful, but does so in a way which is directly tied to the visa for which the inaccurate or untruthful information was given.

86 86 There are other, wider, powers of cancellation and refusal which are conferred by the scheme. Section 116 contains a cancellation power exercisable in a wide range of circumstances there set out. Some of the specified conduct is conduct occurring in relation to the visa which may be the subject of cancellation (e.g. that the person has not complied with a condition of the visa – s 116(1)(b)). Some of the conduct is far broader – for example that the presence in Australia of the person may be a risk to “the health, safety or good order of the Australian community, or a segment of the Australian community” (s 116(1)(e)).

87 87 More critically, s 116 appears to address the very circumstances of the present appellant. Section 116(1AB) provides:

Subject to subsections (2) and (3), the Minister may cancel a visa (the **current visa**) if he or she is satisfied that:

(a) incorrect information was given, by or on behalf of the person who holds the

current visa, to:

- (i) an officer; or
 - (ii) an authorised system; or
 - (iii) the Minister; or
 - (iv) any other person, or a tribunal, performing a function or purpose under this Act; or
 - (v) any other person or body performing a function or purpose in an administrative process that occurred or occurs in relation to this Act; and
- (b) the incorrect information was taken into account in, or in connection with, making:
- (i) a decision that enabled the person to make a valid application for a visa; or
 - (ii) a decision to grant a visa to the person; and
- (c) the giving of the incorrect information is not covered by Subdivision C.

This subsection applies whenever the incorrect information was given and whether the visa referred to in subparagraph (b)(i) or (ii) is the current visa or a previous visa that the person held.

88 88 The power is discretionary: it will need to be exercised taking into account the particular circumstances attending the conduct of an individual. It may be subject to merits review, but the legislative scheme also gives the Minister the power to avoid merits review by exercise of the s 116 cancellation power personally: see s 133C(3). Section 133C also empowers the Minister to override a merits review decision favourable to a person whose visa has been cancelled under s 116. The power is, in its text, clearly intended to enable cancellation of an existing visa because of dishonest conduct in relation to a previous visa.

89 89 There are also the character cancellation and refusal powers in ss 501, 501A and 501B, all of which turn on a precondition whether a person is reasonably suspected not to pass the “character test”, as defined in s 501(6). In particular, one aspect of the “character test” is 501(6)(c)(ii): namely that a person is not of good character having regard to “the person’s past and present general conduct”.

Character test

- (6) For the purposes of this section, a person does not pass the *character test* if:
- (a) the person has a substantial criminal record (as defined by subsection (7)); or
 - (aa) the person has been convicted of an offence that was committed:

- (i) while the person was in immigration detention; or
 - (ii) during an escape by the person from immigration detention; or
 - (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or
- (ab) the person has been convicted of an offence against section 197A; or
- (b) the Minister reasonably suspects:
 - (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
 - (ii) that the group, organisation or person has been or is involved in criminal conduct; or
- (ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:
 - (i) an offence under one or more of sections 233A to 234A (people smuggling);
 - (ii) an offence of trafficking in persons;
 - (iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or
- (c) having regard to either or both of the following:
 - (i) the person's past and present criminal conduct;
 - (ii) the person's past and present general conduct;

the person is not of good character; or
- (d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:
 - (i) engage in criminal conduct in Australia; or
 - (ii) harass, molest, intimidate or stalk another person in Australia; or
 - (iii) vilify a segment of the Australian community; or
 - (iv) incite discord in the Australian community or in a segment of that community; or
 - (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

- (e) a court in Australia or a foreign country has:
 - (i) convicted the person of one or more sexually based offences involving a child; or
 - (ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or
- (f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:
 - (i) the crime of genocide;
 - (ii) a crime against humanity;
 - (iv) a war crime;
 - (iv) a crime involving torture or slavery;
 - (v) a crime that is otherwise of serious international concern; or
- (g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or
- (h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the *character test*.

90 90 The prohibition about bogus documents in s 103 is repeated, in a different context, in s 487ZI. It provides:

487ZI Prohibition on, and forfeiture of, bogus documents

- (1) A person (whether a citizen or non-citizen) must not give, present, produce or provide a bogus document to an officer, an authorised system, the Minister, a tribunal or any other person or body performing a function or purpose under, or in relation to, this Act (the *official*), or cause such a document to be so given, presented, produced or provided.
- (2) A bogus document given, presented, produced or provided in contravention of subsection (1) is forfeited to the Commonwealth.

91 91 Section 487ZI provides for forfeiture of such documents, and s 487ZJ empowers their seizure. Whether a document is a bogus document within the definition of that term in s 5 of the Act can be challenged, and a Court may determine the question: see s 487ZK.

92 92 There is nothing in the rest of the legislative scheme supportive of the construction of s 91WA for which the Minister contends, and which the Federal Circuit Court accepted. The scheme contains measures designed to deal with the provision of false, incorrect and

untruthful information by people who have applied for visas. The fact that the measures chosen sit generally within the parts of the Act dealing with cancellation suggests there is no support in the scheme to single out s 91WA for a construction which would bring forward this administrative reaction to the use of bogus documents in a former visa application to a point in time which precludes a person from entering the protection visa decision-making process altogether. Further, the remainder of the provisions suggest the scheme intends that a discretionary approach be taken to conduct of the kind the appellant has engaged in. It may well be that if the appellant were otherwise successful in securing the grant of a protection visa on the merits of his claims, it would be cancelled under (for example) s 116(1AB). If so, the elaborate judicial review process in which the Court is currently engaged might be a pyrrhic victory for the appellant. However, as we have noted, the cancellation powers are discretionary and how they are exercised in a particular case will always depend on the particular circumstance existing at the time of that exercise.

Extrinsic material

93 93 Correctly, the Minister submits:

‘statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning’: *Minister for Immigration and Border Protection v Han* (2015) 231 FCR 113 at 117–118 [27] citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [31].

94 94 In *Saeed* at [31]–[33] French CJ, Gummow, Hayne, Crennan and Kiefel JJ said: (footnotes omitted, emphasis in original)

As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative ‘intention’ is to be ascertained, ‘what is involved is the ‘intention *manifested*’ by the legislation.’ Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

In *Re Bolton; Ex Parte Beane* the question was whether a statutory provision concerned with ‘visiting forces’ applied to deserters from the armed forces of the United States. Mason CJ, Wilson and Dawson JJ said:

‘[T]he Second Reading Speech of the Minister ... quite unambiguously asserts that Pt III relates to deserters and absentees whether or not they are from a visiting force. But this of itself, while deserving serious consideration, cannot be determinative; it is available as an aid to interpretation. The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be

translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.’

Regard was had by the Full Court in this case to what was said in *Re Bolton; Ex Parte Beane*. Nevertheless, it is apparent that the Court did not consider the actual terms of s 51A and its application to the provisions of the subdivision. As was pointed out in *Catlow v Accident Compensation Commission* it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction.

95 95 A similar caution was issued by the plurality in *Baini v The Queen* [2012] HCA 59; 246 CLR 469 at [14]:

Whether there has been a ‘substantial miscarriage of justice’ within the meaning of s 276(1)(b) requires consideration of the text of the statute. As the Court said in *Fleming v The Queen*, ‘[t]he fundamental point is that close attention must be paid to the language’ of the relevant provision because ‘[t]here is no substitute for giving attention to the precise terms’ in which that provision is expressed. Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text. These paraphrases do not, and cannot, stand in the place of the words used in the statute.

(Footnotes omitted.)

96 96 These cautionary statements should be seen as applicable to the use of extrinsic material under either s 15AB(1)(a) or (b) of the *Acts Interpretation Act 1901* (Cth). Whether or not there is ambiguity, or whether extrinsic material is relied on only to “confirm” the ordinary meaning, there is always a danger of attention being diverted from the statutory text itself.

97 97 For the reasons we have set out above, in our opinion the scope and operation of s 91WA is apparent without resort to the extrinsic material. However, the extrinsic material in this situation is not inconsistent with the conclusion we have reached. If the Court’s construction were inconsistent with the extrinsic materials that should, at the least, be a reason to pause and consider again the construction favoured before reaching a final conclusion. There is no need for such reconsideration in the present case.

98 98 The Explanatory Memorandum (p 2) contains the following description of the provision, its purpose and scope:

Amended section 91W and new section 91WA relate to the provision of documentary evidence of identity, nationality or citizenship for the purposes of a protection visa application and are integrity measures. Establishing an asylum seeker’s identity is a critical factor in determining whether a non-citizen engages Australia’s protection obligations. The amendments establish grounds to refuse the grant of a protection

visa to a protection visa applicant who:

- • refuses or fails to provide evidence of identity, nationality or citizenship when requested to do so;
- • provides a bogus document in response to such a request or provides bogus documents for the purposes of their application; or
- • destroys or disposes of documentary evidence of identity, nationality, or citizenship, or causes such evidence to be destroyed or disposed of.

The refusal power will not apply if the applicant has a reasonable explanation and either produces documentary evidence of their identity, nationality or citizenship or has taken reasonable steps to provide such evidence. It is not acceptable for the applicant to produce any document as documentary evidence of their identity, nationality or citizenship that is a bogus document.

99 99 Further on in the Explanatory Memorandum, when dealing with the sections themselves, the Explanatory Memorandum states:

55. The purpose of new section 91WA is to encourage an applicant to comply and assist with authenticating their identity, nationality or citizenship by providing a reasonable explanation for providing a bogus document or for the destruction or disposal of the documentary evidence and either providing documentary evidence of their identity, nationality or citizenship or having taken reasonable steps to provide evidence. It would not be acceptable for the applicant to produce any document as documentary evidence of their identity, nationality or citizenship that is a bogus document.
56. The effect of subsection 91WA(2) is that if an applicant satisfies that subsection, the applicant will not be refused a protection visa under subsection 91WA(1) of the Migration Act.
57. The purpose of this amendment is to ensure a protection visa applicant provides documentary evidence of their identity, nationality or citizenship wherever possible to do so and to discourage applicants from providing false identity documents, or destroying or discarding existing, genuine documents.

100 100 The Addendum to the Explanatory Memorandum, which deals with further explanations about the application of some of the amendments to people who are stateless, also makes it clear, in the explanation of the operation of s 91WA(2) to stateless people, that the context in which the provision is intended to operate is the context of proof of identity and nationality during the protection visa process.

101 101 The Second Reading Speech is to similar effect. The then Minister for Immigration and Border Protection said (House of Representatives Hansard, 25 June 2014, pp 7278-7280):

These changes to the current protection determination system will improve the integrity of decision making. Australians need to be confident that those who are found to be refugees are in fact who they say they are. If asylum seekers do not cooperate with the government to establish their identity they should not be given the

benefit of a protection visa. These amendments will make it clearly the responsibility of a person who comes to this country seeking protection to establish their own claims to be a refugee and to do so at the beginning of the process...

Schedule 1 of the bill improves integrity *within the protection status determination process*, starting with an amendment which sends a clear message that the ultimate responsibility lies with the asylum seeker to establish their claims for protection and to provide sufficient evidence to support those claims.

....

Establishing an applicant's identity is a keystone of making a decision to grant or refuse any visa. This is especially the case for protection visa applicants because their identity, nationality or citizenship can have a direct bearing on whether they engage Australia's protection obligations. Identity in the global age is increasingly complex to determine and many people hold dual or multiple nationalities or seek an advantage from not disclosing their genuine identity. This bill introduces amendments that enhance the process of establishing identity for protection visa applicants, and addresses the ways in which that process has been frustrated in the past. Changes to section 91W of the Migration Act, and the introduction of a new section 91WA, introduce a power to refuse the grant of a protection visa unless the applicant provides documentary evidence of their identity, nationality or citizenship when requested to do so, or has taken reasonable steps to do so. Presenting bogus documents for the purpose of establishing identity will result in refusal of a protection visa application unless the applicant has a reasonable explanation for presenting them and either provides documentary evidence of their identity, nationality or citizenship, or has taken reasonable steps to do so. The same applies to an applicant who has destroyed or discarded identity documents, which has been a common practice of those who have entered Australia illegally, or has caused that to happen at the hands of another person such as a people smuggler.

It is appropriate to refuse a protection visa where an applicant fails or refuses to comply with a request to establish their identity, where it is in fact possible for them to do this. These measures make it clear that Australians expect protection visa applications to be made in good faith, and with full disclosure of identity.

....

...These changes uphold the importance of integrity, the establishment of identity, and increased efficiency in our protection processing system.

(Emphasis added.)

102 102 We have omitted parts of the Second Reading Speech which are less about the characteristics of the amendments and more about the then government's political position on asylum seekers. The mix of tone and purpose in extrinsic material such as a Second Reading Speech is one of the features which makes such material unreliable as a source of assistance for constructional choices.

103 103 If anything can be said about the utility of this extrinsic material, it is the function described by Mason P (Beazley and Giles JJ agreeing) in the NSW Court of Appeal in *Harrison v Melhem* [2008] NSWCA 67; 72 NSWLR 380 at [162], where his Honour

explained that extrinsic material may well assist in identifying the mischief to be alleviated or avoided by particular provisions, but beyond that is unlikely to elucidate the meaning of the text as enacted. We consider the extrinsic material above, in addition to not being inconsistent and therefore not provoking any need for the Court to pause and reconsider, does at least indicate the mischief the amendments were designed to cure. The mischief was clearly related to the need for accurate and truthful establishment of identity (and citizenship and nationality) during the protection visa application and decision-making process.

104 104 Finally, we reject the Minister's submission that the appellant's stated intention about his earlier visa application (that is, in applying for the earlier visas he had been seeking "protection") somehow brings him within s 91WA. Accepting the Tribunal's reasons indicate the appellant made such statements, the scope of s 91WA does not on any view extend to the provision of bogus documents on any visa application where a person seeks "protection", as that word is used colloquially. The Minister's submission conflates the appellant's description of his motivation on first entry with the making of a claim for a protection visa under the Act. Entry on a student visa might "protect" a person, or at least a person might think it is capable of doing so. Section 91WA is not directed to such a situation. Its scope concerns what occurs during the process of making a protection visa application under the Act. There is no basis for dismissing the appeal because of the use by the appellant in his evidence before the Tribunal of the word "protection". This submission is without merit.

Conclusion

105 105 In our opinion both the Tribunal and the Federal Circuit Court erred in their construction of the scope and operation of s 91WA of the Act. We do not consider that the conduct of the appellant, deserving of opprobrium as it may have been, fell within the terms of s 91WA(1), properly construed. As a protection visa applicant, he did not provide a bogus document.

106 106 The appeal must be allowed, and the decision of the Federal Circuit Court set aside. The appellant has not had his claims for a protection visa assessed on their merits and that is what should now occur. The matter will be remitted to the Tribunal, for determination according to law. The Tribunal should be differently constituted because the Tribunal as constituted made findings for the purposes of s 91WA(2) which reflected an adverse view of the appellant's credibility.

107 107 There is no basis for anything other than the usual order as to costs. The Minister
should pay the appellant's costs in the Federal Circuit Court.

I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Mortimer and Wigney.

Associate:

Dated: 5 May 2017